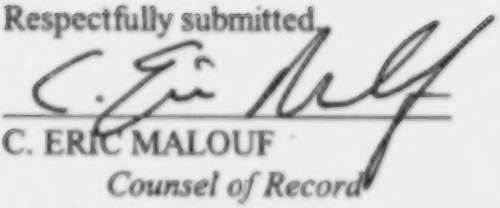
Respectfully submitted,



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Date: November 16, 2005

No. 05-640

DEC 16 2005
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

LARRY G. BELLUM,

Petitioner,

v.

PCE CONSTRUCTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Court of Appeals Correctly Upheld Regulation 29 C.F.R. § 825.111(b) as It Directly Parallels the Stated Purpose of the Small Operations Exemption in the Family and Medical Leave Act.

II. Whether the Court of Appeals Correctly Upheld Regulation 29 C.F.R. § 825.111(b) Where the Statute is Silent on the Issue and the Regulation Is a Permissible Interpretation of the Statute.

PARTIES TO THE PROCEEDING

Petitioner

Larry G. Bellum
1647 David Allen Road
Greensburg, Louisiana 70441

Respondent

PCE Constructors, Inc.
Bob Robards, President and Owner
13544 Eads Road
Prairieville, Louisiana 70769

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

As Respondent argued in the district court, PCE Constructors Inc. ("PCE") is not a proper party under Rule 17 of the Federal Rules of Civil Procedure because it is not the successor to Constructors, Inc. which employed Petitioner during the relevant period. In their decisions, both the district court and the Fifth Circuit noted that they did not find it necessary to reach this issue in resolving the case in PCE's favor.

Respondent PCE Constructors, Inc. is actually Constructors, Inc. d/b/a PCE Constructors, Inc. in Mississippi. Constructors, Inc. is not and never has been the same entity as PCE Constructors, Inc., a Louisiana Corporation incorporated on January 15, 2002, and located at 13544 Eads Road, Prairieville, Louisiana 70769. PCE Constructors, Inc. has since reorganized as PCE Group, Inc.

The Fernwood, Mississippi location where Petitioner was employed is no longer owned by PCE Constructors, Inc.

No parent company or publicly held company owns, or has ever owned, 10% or more of the stock of respondent corporation Constructors, Inc. d/b/a PCE Constructors, Inc. in Mississippi or of any of the other entities listed here.

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Harbert v. Healthcare Services Group, Inc., 391 F.3d 1140 (10th Cir. 2004) 6

Humenny v. Genex Corp., Inc., 390 F.3d 901 (6th Cir. 2004) 1

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002) 5, 8

Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) 3, 5

REGULATIONS & STATUTES:

28 U.S.C. § 1254(1) 1

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29 U.S.C. § 2611(2)(B)(ii) 1, 2, 6, 9

OTHER AUTHORITIES:

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House Report No. 102-135(I) 6, 7

House Report No. 101-28(I) 7

OPINIONS BELOW

The United States District Court for the Southern District of Mississippi granted summary judgment to the Respondent, PCE Constructors, Inc. ("PCE"), as PCE is excluded from the Act's coverage pursuant to the Act's small operations exemption. The United States Court of Appeals for the Fifth Circuit affirmed, reported at *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734 (5th Cir. 2005). The Fifth Circuit denied without opinion Bellum's petition for rehearing.

JURISDICTION

The Fifth Circuit's April 25, 2005 opinion renders this case reviewable pursuant to 28 U.S.C. § 1254(1). To the extent the Court upholds the regulation at issue, however, PCE remains excluded from the Act's coverage and the Court lacks subject matter jurisdiction to decide the Petitioner's claim.[1]

RELEVANT PROVISIONS

This appeal involves the meaning of the term "miles" as stated in 29 U.S.C. § 2611(2)(B)(ii) of the Family and Medical Leave Act of 1993, and the FMLA Regulation which defines the term as surface transportation miles, 29 C.F.R. § 825.111(b).

[1] "Where a plaintiff does not qualify as an 'eligible employee,' the court lacks jurisdiction to decide the FMLA claim." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 904 (6th Cir. 2004).

STATEMENT OF THE CASE

The District Court and Fifth Circuit correctly determined that PCE's Fernwood and Baton Rouge worksites were more than 75 miles apart, and therefore, the aggregate number of employees within 75 miles of either worksite did not exceed 50. These determinations effectively removed PCE from the FMLA's coverage pursuant to the Act's small operations exemption, 29 U.S.C. § 2611(2)(B)(ii). The Plaintiff disputes the determinations of the lower courts, and asserts instead that the two worksites were less than 75 miles apart if the miles are measured using a linear or radius method, or "as the crow flies." However, the statute *as enacted* eliminates all references to a "radius" method of measuring the 75-mile distance. Furthermore, the accompanying regulation explicitly defines the distance as "surface miles, using surface transportation . . . " Although the Petitioner questions the validity of this regulation, the Fifth Circuit's *Chevron*[2] analysis clearly establishes that the regulation is a permissible and valid interpretation of the statute which must, therefore, be afforded deference. Lastly, this appeal presents an issue of first impression – no other district court or court of appeals has construed the term "miles" for purposes of the FMLA's small operations exemption. Even though the Petitioner opposes the Fifth Circuit opinion below, that opinion stands as the only opinion on point at this juncture. Therefore, this dispute does not present a fundamental issue or conflict necessitating review by this Honorable Court.

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[2] *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

REASONS FOR DENYING THE PETITION

I. Regulation 29 C.F.R. § 825.111(b) and the Fifth Circuit's Decision Do Not Conflict with "the Clear Intent of Congress" as Asserted by Petitioner, Nor Do They Conflict With the Decisions of Other Courts

The petitioner contends that Congress' intent to use a radial method of measurement is "clearly expressed" throughout the legislative history of the Act, and that, accordingly, the District Court and Fifth Circuit should have struck down the FMLA regulation that defines "miles" as surface miles. Admittedly, certain Senate and House Reports refer to a 75-mile "radius," but Congress deleted these references from the FMLA *as enacted*. Pursuant to *Russello v. United States*, the references to "radius" lost all meaning upon their deletion by Congress, thereby permitting one to presume that the prior language was not intended to apply to the final version of the Act.[3] Since the references to "radius" no longer delimit the term "miles," Petitioner cannot justifiably assert that that the deleted references constitute "clear" Congressional intent.

In addition, after deleting from the Act all references to a 75-mile "radius," Congress refrained from clearly defining or otherwise expressing its intended method of measuring "miles." Therefore, Congress has not "directly

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[3] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24, 104 S.Ct. 296, 301, 78 L.Ed.2d 17 (1983); *Arizona v. California*, 373 U.S. 546, 580-81, 83 S.Ct. 1468, 1487-88, 10 L.Ed.2d 542 (1963).

spoken to the precise question at issue" within the meaning of *Chevron*.[4] Rather, the statute "is silent or ambiguous with respect to the specific issue" in this case. Since the statute itself fails to express a "clear" Congressional intent to define the term "miles" as surface miles or as linear miles, it cannot be said that the regulation or the Fifth Circuit's decision conflict with "the clear intent of Congress" as alleged by Petitioner.

Lastly, neither the regulation nor the Fifth Circuit's decision conflict with other district courts or courts of appeals. The Fifth Circuit's analysis of the term "miles" as stated in the FMLA small operations exemption stands as the only authority on this precise issue. No district court has addressed the provision at issue, other than in dicta or other colloquial language,[5] and no other Circuit has analyzed the proper method of measuring "miles" in this regard. Therefore, no Circuit split exists at this time, and there is no emerging minority view to create a Circuit split. Accordingly, it cannot be said that another court would reach a different result on the same or similar facts.

II. The Fifth Circuit's *Chevron* Analysis Correctly Concluded That the Regulation is a Permissible and Valid Interpretation of the Statute

The Petitioner contends that the regulation is not a permissible construction of the FMLA under the second

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[4] *See* Section II below for further discussion of the *Chevron* doctrine.

[5] For example, on pages 11-13 of his Petition, Petitioner references 26 cases that mention a "75-mile radius," but *none* of the cases address the issue of how miles should be measured for the application of the small operations exemption.

prong of *Chevron*,[6] which applies when Congress has left an explicit or implicit gap in the statutory language or when "the statute is silent or ambiguous with respect to the specific issue." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Under the second prong of the analysis, the court must simply determine "whether the agency's answer is based on a permissible construction of the statute," and in doing so, the court must consider only whether the regulation is arbitrary, capricious, or manifestly contrary to the statute. *Id.*

In the case at bar, the statute fails to define the intended method of measuring "miles," and pursuant to *Russello*, the historical references to a 75-mile "radius" lost all meaning when Congress eliminated said references from the Act. Since the statute is "silent or ambiguous" as the proper measurement of "miles," the Fifth Circuit analyzed the accompanying regulation under the *Chevron* doctrine and concluded the Secretary's construction of the FMLA provision is a *permissible* interpretation of the statute based upon the stated purpose of the small operations exemption.

Congress included in the FMLA a small employer exemption that excludes from coverage any employer with less than fifty (50) employees, but separately provided an

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[6] The Petitioner also contends that the Secretary of Labor exceeded his authority by altering the coverage of FMLA leave. In doing so, Petitioner erroneously leads the Court to believe that this regulation has a similar effect to the regulation at issue in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002), which imposed certain notice requirements not required by statute. The Fifth Circuit disposed of this contention in footnote 6 of its decision.

exclusion for small operations – i.e., "a potentially large company with a relatively small satellite office in a particular area." *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1148 (10th Cir. 2004).[7] The specific purpose of this separate exclusion for small operations was to recognize and accommodate the difficulties and concerns employers face in reassigning workers to geographically separate facilities. *Id.*, *quoting* H.R. Rep. No. 102-135(I) at 37 (1991). The Tenth Circuit opined in *Harbert* that in enacting the small operations exemption, Congress "determined that if any employer (large or small) has no significant pool of employees *nearby* to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee."[8] *Id.* at 1149 (*emphasis in original*).

This purpose clearly focuses on reassigning employees to geographically separate facilities during another employee's FMLA leave (twelve weeks maximum). A *temporary* reassignment of this nature inevitably requires transporting the replacement employee to and from the geographically separate facility. The regulation defining "miles" as "surface miles, using surface transportation"

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[7] In this case, the Tenth Circuit reviewed the agency's interpretation of the term "worksite" where Congress failed to define the term. Though the terms "worksite" and "miles" both appear in 29 U.S.C. § 2611(2)(B)(ii), the small operations exemption, the Tenth Circuit did not analyze the method of measuring "miles." The court did, however, discuss at length the stated purpose of the exemption.

[8] This is precisely the situation in the case at bar. PCE did not have a significant pool of employees nearby who could have traveled less than 75 miles *by surface transportation* to cover for Mr. Bellum during his FMLA leave. The Fifth Circuit recognized this practical problem as precisely the difficulty that Congress intended to accommodate for employers.